IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case number: JR2330/16

In the matter between:

DOCTOR LEBEYA **Applicant**

and

COMMISSIONER LAZARUS MATLALA **First Respondent**

CCMA **Second Respondent**

LONMIN PLATINUM MINE **Third Respondent**

Heard: 11 January and 18 February 2019

Delivered: 14 June 2019

JUDGMENT

NORTON, AJ

Background

[1] The Applicant was employed as a security and risk management officer by the Third Respondent. He was dismissed on 25 April 2016 following a disciplinary enquiry in which he was found guilty of dishonesty. At the heart of the misconduct was two fraudulent travel claims submitted by the Applicant to the Third Respondent.

[2] On 13 and 27 June 2015, whilst off duty the Respondent called on the Applicant to report for work. In terms of company policies and procedures when an employee receives such a call out, the employee is entitled to claim travelling expenses if the

employee uses his / her own car. If an employee travels by any other mode, eg bus or tax, then the employee is entitled to be reimbursed for those costs, and is required to submit slips as proof of such travel.

[3] The Applicant claimed that he travelled 154 km for each trip calculated at R486.64 (a trip) and was reimbursed for the first trip but not for the second. About 6 months later the Third Respondent, viewed security footage and discovered that the Applicant had travelled in a colleagues car, and was thus not entitled to claim for travelling expenses.

[4] The Third Respondent charged the Applicant on 14 December 2015 with dishonesty and misrepresentation with respect to the events of 13 and 27 June 2015. Furthermore the Third Respondent charged the Applicant with breaching the company's Code of Business Ethics, and the Travelling Policy.

[5] The Third Respondent found the Applicant guilty as charged and dismissed him on 25 April 2016. The Applicant referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA found that the dismissal was procedurally and substantively fair.

[6] On the 27 October 2016 the Applicant approached the Labour Court to review and set aside the First Respondent's award.

Points *in limine*

[7] There were two interlocutory applications before me. First, the Applicant sought condonation for the late service and filing of the review application which was 12 days late. The explanation lies with delays occasioned by his former attorney, and Scorpion.

[8] The second application is a rule 11 application instituted by the Third Respondent on 5 November 2017 to dismiss the review application as the Applicant had failed to file the record timeously. The Applicant eventually filed the record on 23 May 2018. He explained that he relied on his attorneys to follow the correct processes, and

they had not. He also explained that he was unemployed and raising funds for the litigation from his community.

[9] The condonation application was granted as the lateness of the review application was minimal with no prejudice to the employer. The Rule 11 application was dismissed as the Applicant eventually produced the record, and the Third Respondent then served and filed their Answering Affidavit. The parties proceeded to draft heads of argument, and prepared to argue the matter. The prejudice suffered to the Applicant if the rule 11 application was granted would have been unfairly severe, essentially denying him an opportunity to present his case and have the review ventilated.

[10] The Court proceeded to hear the merits of the matter as set out in the pleadings and record of the review.

Grounds of review

[11] The Applicant initially challenged the award on both the procedural and substantive leg, but in their Supplementary affidavit abandoned his procedural challenges. Substantively the Applicant asserts that the First Respondent committed a reviewable irregularity in that:

18.1 The Third Respondent "failed to prove that by riding in friend's vehicles and claiming for such kilometres is in contravention of the …policy"

18.2 The commissioner ignored the Applicant's '*unchallenged version…that he was not asked as to with whom did he travel on the dates in question*"

18.3 The commissioner '*erred, was unreasonable, committed a latent gross irregularity and/or exceeded his powers in finding that employer's travel policy states that employees who claim for travelling will be required to have their privately – owned vehicle*…"

18.4 The commissioner '*failed to contextualise / and or appreciate the true nature of the travel policy including reasons and / or purpose for a claim, which Applicant submits is to cover transport costs for call out* …"

18.5 The commissioner erred by finding that "*such misrepresentation demonstrates lack of straightforwardness…"*

18.6 The commissioner erred by finding that "*the Applicant had contravened important rules and policies governing the conduct of employees*…"[1]

The evidence before the First Respondent

[12] The Third Respondent presented the Policy on Travel Allowances and Business Travel. The relevant provisions are as follows:

12.1 Scope: "…This policy is applicable to all staff who are required to use their privately owned vehicles for business purposes in the RSA."

12.2 Clause 4.1.5: "*Employees will be required to have their privately-owned vehicle available to travel on Lonmin business when required to do so*."

12.3 Clause 4.2.2 "*Employees who do not receive a travel allowance will be allowed to claim all business travelled.*"

[13] Mr Pieterse (the Security Risk Management Superintendent) gave evidence that an employee who is on a call out is entitled to claim for the kilometres travelled when using his / her privately owned vehicle. He said that the Applicant was not entitled to any kilometres travelled for 13 and 27 June 2015 as he did not use his own vehicle. He obtained a lift from colleagues who were going to work in the ordinary course. (On 13 June 2015 the Applicant was a passenger in a vehicle driven by a colleague, Mr Mamogale. On 27 June 2015 the Applicant was a passenger in a vehicle driven by Mr Moyo.)

[14] Mr Pieterse also gave evidence that the Applicant could claim for expenses actually incurred on production of proof, i.e. a slip or ticket. In such circumstances employees were required to complete a form entitled, "*Expenses and subsistence allowance form*". The Applicant submitted no proof that he had paid for petrol in his colleagues' vehicles.

[1] Para 35 of the Supplementary Affidavit.

[15] Pieterse explained that he had a blue file of the various policies and procedures, including the travel policy and claim forms, and explained to the employees, including the Applicant, what they entailed. He testified further that trust is of paramount importance in the industry. He found the Applicant's conduct dishonest and incompatible with a continuing work relationship.

[16] Mr Lebeya said that he claimed for payment of petrol as he filled up Mr Mamogale's vehicle and Mr Moyo's. He could not recall how much he paid for petrol on the separate occasions. He also did not produce any slips indicating the amount paid. This was confirmed by Mr Mamogale who testified that Mr Lebeya had paid for petrol when he gave him a lift to work.

[17] Mr Moyo testified in cross examination at the CCMA that he sometimes gave a lift to a different employee, namely Mr Mboweni. Mr Mboweni claimed for travel, and was dismissed by the Third Respondent. The Applicant persisted with his view that he was entitled to claim for kilometres travelled, when he had not used his own car, but had travelled with colleagues in their own cars.

The arbitrator's award

[18] The arbitrator's award is clearly written and well structured. The arbitrator summarised the evidence and found that the Applicant claimed on the 13 and 27 June for 154 kms x R3.16 per km on both days. The arbitrator sensibly approached the matter through the gaze of Item 7 of Schedule 8 of the Labour Relations Act[2] (the LRA) by asking the following questions:

18.1 Did the employee transgress a workplace rule?
18.2 Was the employee aware of the rule?
18.3 Was the employee aware of the consequences of contravening the rule?
18.4 Did the employer apply the rule consistently?
18.5 Was dismissal the appropriate sanction?

[2] 66 of 1995, as amended.

[19] The arbitrator analysed the facts, and answered these questions in the affirmative. He found that the Travel Policy and Code of Business Ethics established the rule of ethical conduct when claiming for travelling expenses when travelling in the employee's own vehicle. The employee was aware of the rule. Noting that a different employee, Mr Mboweni had previously been dismissed for precisely the same misconduct, he reasonably knew the risk of his transgression.

[20] The arbitrator found that the Applicant's misconduct constituted dishonesty and that dismissal was the appropriate sanction. He concluded by findng "*that the Respondent cannot reasonably be expected to keep the Applicant in its employ, the applicant is a dishonest employee*."[3]

Analysis

[21] The "grounds" of review presented by the Applicant, are no grounds at all. The Applicant had breached his employer's policies; use of the employee's own private car was a prerequisite for claiming for travel costs for kms / distance travelled; the purpose of such a policy is to reimburse the employee for travel costs incurred travelling to work on a "day off". The Applicant was entitled to produce the slips for the petrol he paid for when he was a passenger in his colleagues' cars, but couldn't do so. (Had he done so, the Third Respondent would have reimbursed him for those costs.) His conduct was dishonest and calculated to mislead Lonmin into making payment to him for travel costs he had not incurred.

The Applicant's submission that the arbitrator's award is irrational, or that the arbitrator exceeded his powers, is simply not supported by the evidence. The Applicant has wholly failed to pass the threshold for review which is to demonstrate that the arbitrator's award falls outside of the spectrum of reasonableness contemplated in the Constitutional Court's decision in *Sidumo & another v Rustenburg Platinum Mines & others*[4] and/or show that the arbitrator committed misconduct, a gross irregularity, or exceeded his powers as set out in section 145(2) of the LRA. Therefore, the award sits comfortably insulated from the Applicant's review challenge.

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[3] Para 64 on p. 14 of the arbitration award.
[4] [2007] 12 BLLR 1097 (CC).

[22] Accordingly I make the following order:

Order

1. The Application is dismissed.

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D. Norton

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Doctor Lebeya

For the Third Respondent: N O Mamabolo Incorporated